U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 22Apr2002

Case No.: 2000-BLA-0790

In the Matter of:

JIMMY DOUGLAS GARRETT,
Claimant

v.

ISLAND CREEK COAL COMPANY,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:

Joseph H. Kelley, Esq.
For the Claimant

Stuart Bennett, Esq.[1]
For the Employer

Brian Dougherty, Esq.
For the Director, OWCP

BEFORE: Robert L. Hillyard
Administrative Law Judge

DECISION AND ORDER - DENIAL OF BENEFITS

This proceeding arises from a claim filed by Jimmy Douglas Garrett for benefits under the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901, *et seq.*, as amended (Act). In accordance with the Act, and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the

[1] Stuart Bennett, Esq., appeared on behalf of Martin E. Hall, Esq.

Director, Office of Workers' Compensation Programs (OWCP). The regulations issued under the Act are located in Title 20 of the Code of Federal Regulations, and regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

Benefits under the Act are awarded to persons who are totally disabled due to pneumoconiosis within the meaning of the Act. Survivors of persons who were totally disabled at their times of death or whose deaths were caused by pneumoconiosis also may recover benefits. Pneumoconiosis is a dust disease of the lungs arising out of coal mine employment, and is commonly known as black lung disease.

A formal hearing was held in Madisonville, Kentucky on November 28, 2001. Each of the parties was afforded full opportunity to present evidence and argument at the hearing, as provided in the Act and the regulations issued thereunder. The findings and conclusions that follow are based upon my observation of the appearance of the witness who testified at the hearing, and a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law. The Claimant and the Employer filed post-hearing briefs which have been considered.

I. STATEMENT OF THE CASE

The Claimant, Jimmy Douglas Garrett, filed the present claim for benefits on March 1, 2000 (DX 1).[2] OWCP issued a Notice of Initial Finding awarding benefits on January 14, 2000 (DX 14). The Employer filed a Notice of Controversion on February 22, 2000 (DX 16). The District Director, OWCP, issued a Proposed Decision and Order - Award of Benefits on May 3, 2000 (DX 19). The Employer appealed and requested a formal hearing before the Office of Administrative Law Judges (DX 20, 21). The case was referred to the Office of Administrative Law Judges on June 12, 2000 (DX 23).

[2] In this Decision and Order, “DX” refers to the Director’s Exhibits, “CX” refers to the Claimant’s Exhibits, “EX” refers to the Employer’s Exhibits, and “Tr.” refers to the transcript of the November 28, 2001 hearing.

II. ISSUES

The specific issues presented for resolution as noted on Form CM-1025 and at the formal hearing (DX 23; Tr. 14-15) are as follows:[3]

1. Whether the Miner has pneumoconiosis as defined by the Act and the regulations;

2. Whether the Miner's pneumoconiosis arose out of coal mine employment;

3. Whether the Miner is totally disabled;

4. Whether the Miner's disability is due to pneumoconiosis;

5. Other issues:[4]

    a. Whether the regulations are constitutional;

    b. Whether the Responsible Operator is responsible for the Miner's medical and/or legal expenses;

    c. Whether comparable work is unavailable; and,

    d. Whether the medical tests meet the regulatory standards.

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[3] The Employer withdrew controversion to the following issues at the hearing: whether the claim was timely filed; whether the Claimant is a miner; whether the Claimant worked as a miner after December 31, 1969; whether the Claimant worked as a miner for sixteen years; whether the Claimant has one dependent for purpose of augmentation; whether Island Creek Coal Company is the Responsible Operator; and, whether the Claimant's most recent period of cumulative employment of not less than one year was with Island Creek Coal (Tr. 14-15).

[4] These issues involve the constitutionality of the Act and the regulations. Administrative Law Judges are precluded from ruling on the constitutionality of the Act. Therefore, these issues will not be ruled on herein but are preserved for appeal purposes.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

The Claimant, Jimmy Douglas Garrett, was born on October 26, 1935, and was sixty-six years old at the time of the hearing (Tr. 17). He has a tenth-grade education (Tr. 18). The Claimant married Marilyn (Bell) Garrett on March 29, 1975 (DX 9). He has no dependent children (DX 1; Tr. 17). I find that the Claimant has one dependent for the purpose of augmentation of benefits, his wife, Marilyn Garrett.

Smoking History

At the November 28, 2001 hearing, the Claimant testified that he started smoking cigarettes at the age of fourteen and smoked at the rate of one pack per day (Tr. 39). He said he quit smoking at the age of sixty-five (Tr. 39). The examining physicians of record reported extensive smoking histories. Dr. Clapp noted in his January 18, 2000 examination report that the Claimant "smokes 1/2 to one pack of cigarettes a day" (DX 18). In his August 16, 2001 report, Dr. Clapp wrote that the Claimant "smokes one or two cigarettes a day" (CX 1), and in his October 18, 2001 report, Dr. Clapp noted that the Claimant "has almost quit smoking" (EX 19). Dr. Houser reported that the Claimant "previously smoked about one pack of cigarettes per day for approximately 50 years" (CX 1). In his February 26, 2001 report, Dr. Houser wrote that the Claimant quit smoking in December 2000 (CX 2, 5). Dr. Selby reported that the Claimant smokes "perhaps a cigarette a day" and that he started smoking "at age 14, smoking an average of about 1 pack a day for 49-50 years" (EX 2). Dr. Simpao reported that the Claimant smoked one pack of cigarettes per day from 1951 to 1999 (DX 11). Dr. Broudy reported that the Claimant smokes "1/2 pack per day" (DX 17). Dr. Jarboe wrote that the Claimant "started smoking at age 14 and smoked about a package of cigarettes a day," and that he "has reduced his consumption to about a half package for the last year" (DX 17). Dr. Lane reported that the Claimant "smoked a pack of cigarettes daily for about 43 years, although he has cut down to 1/2 pack per day" (DX 17). Based on the Claimant's testimony and the smoking histories reported by the examining physicians, I find that the Claimant has a smoking history of one pack of cigarettes per day for fifty years.

Length of Coal Mine Employment

On the CM-911a Employment History form, the Claimant reported that he was employed by Island Creek Coal Company in

Morganfield, Kentucky from October 1976 through December 1992 (DX 2). At the formal hearing, the Employer stipulated that the Claimant established sixteen years of coal mine employment (Tr. 14). This is supported by the Claimant's W-2 forms and the Social Security Administration Itemized Statement of the Claimant's Earnings (DX 4, 6). Based on the evidence of record, I find that the Claimant was employed by Island Creek Coal Company from October 1976 through December 1992, for a total of sixteen years of coal mine employment. As the Claimant's coal mine employment took place in the Commonwealth of Kentucky, the law of the Sixth Circuit Court of Appeals applies.

Responsible Operator

Island Creek Coal Company does not contest its designation as the Responsible Operator. This is supported by the evidence of record and I so find.

IV. MEDICAL EVIDENCE

A. X-ray Studies

	Date	Exhibit	Doctor	Reading	Standards
1.	8/16/01	CX 4	Brandon B reader[5] Board cert.[6]	1/1, p,p	Fair
2.	2/23/01	EX 15	Wheeler B reader Board cert.	No pneumo.; emphysema	Fair
3.	2/23/01	EX 15	Scott B reader Board cert.	No pneumo.; emphysema	Good

[5] A "B reader" is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services. *See* 42 C.F.R. § 37.51(b)(2).

[6] A Board-certified Radiologist is a physician who is certified in Radiology or Diagnostic Roentgenology by the American Board of Radiology or the American Osteopathic Association. *See* § 718.202(a)(ii)(C).

	Date	Exhibit	Doctor	Reading	Standards
4.	2/15/01	EX 15	Wheeler B reader Board cert.	No pneumo.; emphysema	Good
5.	2/15/01	EX 15	Scott B reader Board cert.	No pneumo.; emphysema	Good
6.	5/16/00	EX 2, 17	Selby B reader	No pneumo.	Fair
7.	5/16/00	EX 4	Wiot B reader Board cert.	No pneumo.	Fair
8.	5/16/00	EX 5	Spitz B reader	No pneumo.	Fair
9.	5/16/00	EX 6	Shipley B reader	No pneumo.	Fair
10.	5/16/00	EX 7	Broudy B reader	No pneumo.	Poor
11.	5/16/00	EX 8	Jarboe B reader	No pneumo.; emphysema	Good
12.	5/16/00	EX 12	Castle B reader	No pneumo.	Fair
13.	1/18/00	DX 18	Lundquist	Pneumo. not noted; COPD	Not noted
14.	1/18/00	EX 1	Wiot B reader Board cert.	No pneumo.; severe emphysema	Good
15.	11/9/99	EX 9	Spitz B reader	No pneumo; emphysema	Good
16.	11/9/99	EX 9	Wiot B reader Board cert.	No pneumo.	Good

	Date	Exhibit	Doctor	Reading	Standards
17.	11/9/99	DX 9	Sargent B reader Board cert.	No pneumo.	Good
18.	11/9/99	DX 11	Simpao	1/0, p,p; emphysema	Good
19.	3/17/99	DX 18	Lundquist	Pneumo. not noted; COPD	Not noted
20.	3/4/99	DX 18	Lundquist	Pneumo. not noted; COPD	Not noted
21.	2/4/97	DX 18	Not noted	Pneumo. not noted; COPD	Not noted
22.	11/1/93	DX 17	Broudy B reader	No pneumo.	Good
23.	10/14/93	DX 17	Jarboe B reader	No pneumo.; emphysema	Good
24.	9/29/93	DX 17	Lane B reader	No pneumo.	Good
25.	6/11/93	DX 17	Broudy B reader	No pneumo.	Fair
26.	6/11/93	DX 17	Jarboe B reader	No pneumo.; emphysema	Fair
27.	6/11/93	DX 17	Wiot B reader Board cert.	No pneumo.	Good
28.	3/18/93	DX 17	Wiot B reader Board cert.	No pneumo.	Fair
29.	3/18/93	DX 17	Jarboe B reader	No pneumo.	Good
30.	3/18/93	DX 17	Broudy B reader	No pneumo.	Good

B. Pulmonary Function Studies[7]

	Date	Exh.	Doctor	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Standards
1.	2/26/01	CX 2	Houser	65/68"	.61	1.84	--	33%	Not noted; three tracings
			Post-bronch.		.60	2.28	--	26%	
	Comment:		Severe obstructive pulmonary impairment.						
2.	5/16/00	EX 2, 17	Selby	64/69"	.54	1.78	23	30%	Good coop.; Comp. not noted; three tracings
			Post-bronch.		.75	2.17	30	35%	
	Comment:		Pre-bronchodilator FVC is invalid; good response to bronchodilator.						
	Validation:		Dr. Castle wrote that the pre-bronchodilator study is not reproducible (EX 6).						
3.	11/9/99	DX 11	Simpao	64/68"	.72	2.0	26	36%	Good coop. and comp.; three tracings
	Comment:		"Reduced vital capacity and flow volume curve. This test indicates a severe degree of both restrictive and obstructive airway disease." "Rest periods given after each attempt due to dyspnea."						
	Validation:		Dr. N.K. Burki found this test to be acceptable (DX 11); Dr. Castle wrote that this test "appear[s] to be valid" (EX 6).						
4.	11/1/93	DX 17	Broudy	58/68"	1.77	3.56	70	49.7%	Good coop. and comp.; three tracings
	Comment:		Spirometry shows evidence of moderately severe obstructive airways disease with no significant responsiveness to bronchodilation.						
5.	10/14/93	DX 17	Jarboe	Data unreadable					
	Comment:		"Moderate degree of airways obstruction which shows no response to bronchodilation."						
	Validation:		Dr. Castle wrote that this pulmonary function test "appear[s] to be valid" (EX 6).						

[7] Because the physicians conducting pulmonary function studies noted varying heights, I must make a finding on the Miner's height. *See Protopappas v. Director, OWCP,* 6 B.L.R. 1-221, 1-223 (1983). Based on the height noted by the majority of physicians, I find the Claimant's height to be 68 inches.

	Date	Exh.	Doctor	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Standards
6.	9/29/93	DX 17	Lane	57/68.5"	1.69	3.44	67.2	49.2%	Not noted;
		Post-bronch.			1.80	3.71	72	48.5%	three tracings

Validation: Dr. Castle wrote that this pulmonary function test is "probably valid" (EX 6).

C. Arterial Blood Gas Studies

	Date	Exhibit	Doctor	pCO_2	pO_2
1.	5/16/00	EX 2, 17	Selby	43	70
2.	11/9/99	DX 11	Simpao	44	60.2

Comment: No exercise arterial blood gas due to "unsteady gait; inner ear problems." "These results indicates a ventilatory perfusion mismatch with hypoxia."

3.	9/29/93	DX 17	Lane	36.3	80

D. CT Scans

1. Dr. Jerome F. Wiot, a B reader and Board-certified Radiologist, issued a letter dated June 6, 2000, in which he wrote that he reviewed "a set of CT scans of the [Claimant's] chest from Union City Methodist Hospital dated 3-25-99" and found "no evidence of coal worker's pneumoconiosis." Dr. Wiot opined that the Claimant's CT scan "shows severe emphysema, with marked over-expansion of the lung fields" (EX 1).

E. Examination Reports

1. a. Dr. William H. Clapp, in an office visit report dated October 18, 2001, wrote that the Claimant "has documented coworkers *[sic]* pneumoconiosis and COPD." Dr. Clapp reported that the Claimant "has almost quit smoking" (CX 7).

b. Dr. Clapp, in a letter dated October 9, 2001, opined that the Claimant "has severe COPD," and "is quite disabled from his chronic obstructive pulmonary disease." Dr. Clapp opined that "the mine dust is part of the disability along with the smoking and possibly a family tendency. I cannot determine which percentage is from which part, but he certainly has severe lung disease and all three factors are probably part of this" (CX 7).

c. In a letter dated March 12, 2001, Dr. Clapp stated that the coal mines contributed to the Claimant's COPD (CX 6).

d. Office visit notes from Dr. Clapp dated from October 1986 through August 17, 2001 diagnose severe COPD and do not mention pneumoconiosis (DX 18; CX 1, 6).

e. An office visit note from Dr. Clapp dated August 16, 2001 stated that the Claimant "smokes one or two cigarettes a day" (CX 1).

f. An office visit note from Dr. Clapp dated January 18, 2000, states that the Claimant "smokes 1/2 to one pack of cigarettes a day" (DX 18).

2. a. Dr. William C. Houser, a Board-certified Internist, Pulmonologist, and Critical Care Physician, in a letter dated October 4, 2001, stated that he has treated the Claimant since February 26, 2001. Dr. Houser stated that the Claimant "previously smoked about one pack of cigarettes per day for approximately 50 years." He opined, "[w]ithout a doubt [the Claimant] is permanently and totally disabled for coal mine or any other type of employment. He is also on continuous O2." Dr. Houser stated that he believed "the cause of [the Claimant's] disability is related to coal workers' pneumoconiosis and severe chronic obstructive pulmonary disease." He wrote that the Claimant's coal workers' pneumoconiosis "is related to exposure to coal and rock dust arising from his former employment as a coal miner," and the Claimant's chronic obstructive pulmonary disease "is related to former cigarette smoking and exposure to coal and rock dusts." Dr. Houser stated that he relied on physical examination and history information of the Claimant, pulmonary function testing, chest radiographs, and medical literature in making his diagnosis (CX 1).

b. In letters dated September 6, 2001, July 5, 2001, and May 3, 2001, Dr. Houser wrote that he examined the Claimant and diagnosed: (1) chronic obstructive pulmonary disease, severe; and, (2) coal workers' pneumoconiosis (CX 2).

c. Dr. Houser examined the Claimant on February 26, 2001, at which time he reviewed the Claimant's symptoms and his occupational ("worked as an underground coal miner for 17 years . . . He did receive a State of Kentucky Black Lung award and has also been awarded Federal Black Lung"), medical (degenerative arthritis, coal workers' pneumoconiosis, and chronic obstructive pulmonary disease), smoking (quit smoking in

December 2000), and family histories, and performed a physical examination, pulmonary function study (moderate reduction in the forced vital capacity with very severe airway obstruction, no response to bronchodilator), and an arterial blood gas study, and interpreted an x-ray (reviewed x-rays of 2/15/00 and 2/23/00, category 1 pneumoconiosis). Dr. Houser diagnosed: (1) severe chronic obstructive pulmonary disease; (2) recent episode of left lower lobe pneumonia; (3) coal workers' pneumoconiosis; and, (4) degenerative arthritis (CX 2, 5).

3. a. Dr. Jeff W. Selby, a B reader and Board-certified Internist, Pulmonologist, and Critical Care Physician, examined the Claimant on May 16, 2000, at which time he reviewed the Claimant's symptoms and his occupational (fifteen years coal mine employment), medical (coughing spells, occasional wheeze, nebulizer, Atrovent and Maxair inhalers), smoking ("occasionally will smoke now . . . perhaps a cigarette a day," started smoking "at age 14, smoking an average of about 1 pack a day for 49-50 years"), and family histories, and performed a physical examination, pulmonary function study ("very severe obstructive defect if this were a completely valid test;" marked improvement after bronchodilator), arterial blood gas study, and interpreted an x-ray (no parenchymal abnormalities consistent with pneumoconiosis and no pleural abnormalities; "severely flattened diaphragms consistent with emphysema"), and an EKG (normal). Dr. Selby diagnosed "a severe degree of emphysema and also . . . a considerable amount of bronchospasm or asthma." In his opinion, "[t]he emphysema was caused in its entirety by [the Claimant's] cigarette smoking" and "[t]he cigarette smoking is a constant irritation to his bronchi leading to chronic bronchitis, but more importantly, to bronchospasm, and is a clear cut, severe exacerbator of his wheezing." Dr. Selby opined that the Claimant "is not totally impaired or even partially impaired as a result of his previous coal mine dust exposure or coal mining occupation from a respiratory or pulmonary perspective" (EX 2).

b. Dr. Selby was deposed by the Employer on October 29, 2001, at which time he recounted his earlier findings and opined that the Claimant is disabled to work as a coal miner from a functional respiratory standpoint due to emphysema and asthma. He opined that the Claimant does not have coal workers' pneumoconiosis or any other respiratory disease either caused by or related to coal dust exposure (EX 17).

4. Dr. Valentino S. Simpao examined the Claimant on November 9, 1999, at which time he reviewed the Claimant's symptoms and his occupational (fifteen and one-half years of

underground coal mine employment; roof bolter and scoop operator), medical (productive cough, dyspnea with rest and exertion, wheezing with exertion), smoking (smoked one pack of cigarettes per day from 1951 to 1999), and family histories and performed a physical examination, pulmonary function study ("severe degree both restrictive and obstructive airway disease"), and arterial blood gas study ("ventilatory perfusion mismatch with hypoxia") and interpreted an x-ray ("coal workers' pneumoconiosis category 1/0"). Dr. Simpao diagnosed "CWP 1/0" based on "multiple years of coal dust exposure" and "findings on the chest x-ray, arterial blood gas and pulmonary function test along with physical findings and symptomatology." In his opinion, the Claimant has a "moderate pulmonary impairment" related to "pneumoconiosis and emphysema" and does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment, based on "objective findings on the chest x-ray, arterial blood gas and pulmonary test along with symptomatology and physical findings noted in the reports" (DX 11).

5. Dr. Bruce Broudy, a B reader and Board-certified Internist and Pulmonologist, examined the Claimant on November 1, 1993, at which time he reviewed the Claimant's symptoms and his occupational (fifteen years coal mine employment, all underground except for one and one-half years strip mining), medical ("has been told that he has black lung and should not work," progressive breathing problems, shortness of breath, dyspnea on exertion), smoking ("1/2 pack per day"), and family histories, and performed a physical examination, pulmonary function study ("moderately severe obstructive airways disease with no significant responsiveness to bronchodilation"), arterial blood gas study, and interpreted an x-ray ("no evidence of coal workers' pneumoconiosis"). Dr. Broudy diagnosed "moderately severe chronic obstructive pulmonary disease." In his opinion, the Claimant does not have coal workers' pneumoconiosis. Dr. Broudy wrote that, "[b]ecause of his moderately severe chronic obstructive airways disease," he does not "retain the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor." Dr. Broudy opined that the Claimant's obstructive airways disease is a result of chronic bronchitis and pulmonary emphysema from cigarette smoking," and did not arise from his occupation as a coal miner (DX 17).

6. a. Dr. Thomas M. Jarboe, a B reader and Board-certified Internist and Pulmonologist, examined the Claimant on October 14, 1993, at which time he reviewed the Claimant's symptoms and his occupational (worked fifteen years in coal

mines, all underground), medical (short of breath, daily morning cough, occasional wheezing), smoking ("started smoking at age 14 and smoked about a package of cigarettes a day. He has reduced his consumption to about a half package for the last year"), and family histories, and performed a physical examination, pulmonary function study ("[t]he spirogram indicates a moderate degree of airways obstruction which does not respond to bronchodilators"), and interpreted an x-ray ("[n]o evidence of pneumoconiosis. The ILO classification is 0/1, s/s . . . [p]ulmonary emphysema"). Dr. Jarboe diagnosed: (1) chronic bronchitis, based on history of chronic cough and mucous production, " . . . due to cigarette smoking;" and, (2) pulmonary emphysema, based on appearance of the chest x-ray with associated moderate airways obstruction, " . . . due to the 40 pack year history of smoking cigarettes." In Dr. Jarboe's opinion, the Claimant "has no evidence of any disease of the respiratory system which has arisen from his occupation as a coal worker." Dr. Jarboe opined that the Claimant does not retain the functional capacity to do his last coal mining job or similar work in a dust-free environment, due to his "moderate airways obstruction" caused by cigarette smoking (DX 17).

b. Dr. Jarboe was deposed by the Employer on November 18, 1993, at which time he recounted the findings of his October 14, 1993 examination of the Claimant and his interpretations of the Claimant's x-rays. Dr. Jarboe opined that the Claimant is unable to perform his usual coal mining work due to cigarette smoking-induced airways obstruction (DX 17).

7. Dr. Emery Lane, a B reader and Board-certified Internist, examined the Claimant on September 29, 1993, at which time he reviewed the Claimant's symptoms and his occupational (fifteen years underground coal mining, primarily operating roof bolter and scoop), medical (shortness of breath, productive cough), smoking ("smoked a pack of cigarettes daily for about 43 years, although he has cut down to 1/2 pack per day"), pulmonary function study, arterial blood gas study, interpreted an x-ray (0/0), and an EKG ("within normal limits"). Dr. Lane diagnosed "chronic obstructive pulmonary disease; no significant response to bronchodilator; no evidence of coal workers' pneumoconiosis." In his opinion, the Claimant does not have an occupational lung disease caused by his coal mine employment. Dr. Lane opined that the Claimant does not retain the pulmonary functional capacity to do his usual coal mine employment or comparable and gainful work in a dust-free environment, due to "chronic obstructive pulmonary disease secondary to cigarette smoking" (DX 17).

F. Consultative Reports

1. a. Dr. Gregory Fino, a B reader and Board-certified Internist and Pulmonologist, reviewed medical records dated from 1986 through 2001, including chest x-rays, CT scans, pulmonary function tests, and arterial blood gas studies, and issued a consultative report dated November 2, 2001. Dr. Fino opined that the Claimant "does not suffer from an occupationally acquired pulmonary condition as a result of coal mine dust exposure," based on the negative chest x-ray readings; the improvement on the Claimant's pulmonary function studies with the use of bronchodilators; the reduced diffusing capacity values, which are consistent with emphysema secondary to smoking; and, the development of new hypoxia, consistent with ongoing smoking. In his opinion, the Claimant "is disabled from returning to his last mining job or a job requiring similar effort," but the Claimant "would be as disabled had he never stepped foot in the mines" (EX 18).

b. Dr. Fino reviewed Dr. Clapp's October 18, 2001 examination report and Dr. Clapp's letters dated March 12, 2001 and October 9, 2001, and issued a consultative report dated November 7, 2001. He recounted the findings of his consultative report dated November 2, 2001, and stated that his opinions remained unchanged (EX 19).

c. Dr. Fino was deposed by the Employer on November 9, 2001, at which time he recounted his earlier findings and opined that the Claimant has no evidence of a chronic coal mine dust-induced lung disease, and that his disabling pulmonary impairment is caused by smoking (EX 20).

2. a. Dr. James R. Castle, a B reader and Board-certified Internist and Pulmonologist, reviewed Dr. Houser's medical report dated February 26, 2001, Dr. Clapp's letters dated March 12, 2001 and October 9, 2001, and Dr. Clapp's treatment records dated April 26, 2000 through February 23, 2001, and October 18, 2001, and issued a consultative report dated November 7, 2001. He recounted the findings of his earlier consultative reports and opined that the Claimant "does not suffer from coal workers' pneumoconiosis," and that the Claimant "does have moderate to moderately severe airway obstruction due to his long and extensive history of tobacco abuse." In his opinion, the Claimant "is permanently and totally disabled as a result of this process" (EX 19).

b. Dr. Castle reviewed Dr. Clapp's examination reports of the Claimant dated from October 2000 through

August 17, 2001, medical records from Dr. Houser dated from February 26, 2001 through September 6, 2001, a medical report by Dr. Houser dated October 4, 2001, and an x-ray report dated August 16, 2001, and issued a consultative report dated November 1, 2001. He opined that the Claimant "does not suffer from coal workers' pneumoconiosis," and diagnosed "at least a moderate to moderately severe degree of airway obstruction which . . . is due to his long and extensive history of tobacco abuse" (EX 17).

c. Dr. Castle reviewed medical records from Dr. Clapp dated April 28, 2000 through March 12, 2001, and issued a consultative report dated March 22, 2001. Dr. Castle recounted the findings of his earlier consultative report dated March 13, 2001, and opined that the Claimant "does not suffer from coal workers' pneumoconiosis and he is not permanently and totally disabled as a result of coal workers' pneumoconiosis." According to Dr. Castle, the Claimant suffers from, and is permanently and totally disabled as a result of, tobacco smoke-induced chronic obstructive pulmonary disease (EX 14).

d. Dr. Castle reviewed Dr. Houser's report dated February 26, 2001, and issued a consultative report dated March 13, 2001, in which he opined that the Claimant does not have coal workers' pneumoconiosis, based upon the physical and radiographic findings. In his opinion, the Claimant has "tobacco smoke induced chronic obstructive airway disease" (EX 13).

e. Dr. Castle reviewed medical records dated from March 1993 through May 2000, including x-rays, pulmonary function tests, arterial blood gas studies, and consultative reports, and issued a consultative report dated October 19, 2000. He opined that the Claimant "does not suffer from coal workers' pneumoconiosis." According to Dr. Castle, the Claimant "does not have the physical findings, the radiographic findings, the physiologic findings, or the arterial blood gas findings to indicate the presence of that disease process." He wrote that the Claimant "is permanently and totally disabled as a result of his severe airway obstruction due to his tobacco smoking habit" (EX 6).

f. Dr. Castle was deposed by the Employer on February 7, 2001, at which time he recounted his earlier findings and opined that the Claimant has a disabling respiratory impairment which "is entirely related to his very long and extensive and heavy tobacco abuse that has resulted in the development of pulmonary emphysema." In his opinion, the

Claimant does not have any respiratory disease or impairment caused by, related to, or aggravated by his occupational exposure to coal dust (EX 11).

3. a. Dr. A. Dahhan, a B reader and Board-certified Internist and Pulmonologist, reviewed medical records dated from October 2000 through August 16, 2001, including chest x-rays, pulmonary function tests, and arterial blood gas studies, and issued a consultative report dated October 30, 2001, in which he opined that the Claimant "has obstructive airway disease . . . of the variety of emphysema and bullae as noted by the chest x-ray." Dr. Dahhan wrote that the Claimant "does not retain the respiratory capacity to continue his previous coal mining work or [a] job of comparable physical demand." In his opinion, the Claimant's "obstructive airway disease was not caused by, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis" (EX 19).

b. Dr. Dahhan reviewed Dr. Houser's February 26, 2001 report, Dr. Clapp's March 12, 2001 letter, and Dr. Clapp's examination reports dated from April 2000 through December 5, 2001, and issued a consultative report dated November 7, 2001. He recounted the findings in his October 30, 2001 consultative report and concluded that the Claimant "has severe chronic obstructive lung disease" (EX 19).

4. a. Dr. Bruce Broudy, a B reader and Board-certified Internist and Pulmonologist, reviewed Dr. Clapp's reports dated from April 2000 through February 2001, and issued a consultative report dated March 19, 2001. Dr. Broudy recounted the findings of his previous reports and opined that the Claimant "has [a] severe respiratory impairment" caused by "chronic obstructive airways disease from cigarette smoking" (EX 14).

b. Dr. Broudy reviewed Dr. Houser's report dated February 26, 2001, and issued a consultative report dated March 12, 2001. He recounted the findings of his earlier report dated August 31, 2000 and opined that the Claimant "has severe chronic obstructive pulmonary disease from pulmonary emphysema due to cigarette smoking and that he is totally and permanently disabled to such an extent that he would be unable to do his regular coal mine work or work requiring similar effort" (EX 13).

c. Dr. Broudy reviewed medical evidence dated from 1986 through May 2000, including examination reports, x-rays, pulmonary function tests, and arterial blood gas studies, and issued a consultative report dated August 31, 2000. Dr. Broudy

diagnosed “pulmonary emphysema with chronic obstructive airways disease due to cigarette smoking.” He opined that the Claimant “is totally and permanently disabled to such an extent that he would be unable to do his regular coal mine work or work requiring similar effort.” According to Dr. Broudy, “none of the impairment in this instance is due to pneumoconiosis” because there was “a progressive decline in function even after [the Claimant] left coal mining,” and the Claimant’s “impairment is primarily obstructive, which is not the type associated with impairment due to pneumoconiosis” (EX 3).

5. a. Dr. Thomas M. Jarboe, a B reader and Board-certified Internist and Pulmonologist, reviewed Dr. Clapp’s reports dated from December 2000 through October 2001, Dr. Houser’s reports dated February 2001 through September 2001, and an August 16, 2001 chest x-ray, and issued a consultative report dated October 30, 2001. Dr. Jarboe opined that the Claimant does not have simple coal workers’ pneumoconiosis, based on the radiographic and physiological evidence of record. According to Dr. Jarboe, the reduction in the Claimant’s FVC and FEV_1 values “was caused by progressive emphysema and air trapping.” Dr. Jarboe wrote that the Claimant “does have a severe pulmonary impairment . . . caused by cigarette smoking and not coal dust inhalation.” He opined that the Claimant “is totally and permanently disabled from a respiratory standpoint to do his last coal mining job or one of similar physical demand,” but that his impairment “has been caused by heavy cigarette smoking with resultant chronic bronchitis and pulmonary emphysema” (EX 17).

b. Dr. Jarboe reviewed Dr. Houser’s February 26, 2001 letter, and Dr. Clapp’s reports dated from April 26, 2000 through February 23, 2001, and issued a consultative report dated March 22, 2001, in which he opined that the Claimant does not have coal workers’ pneumoconiosis. Dr. Jarboe wrote that the Claimant “has advanced pulmonary emphysema with severe airflow obstruction [which] resulted from cigarette smoking and not from coal dust inhalation” (EX 14).

c. Dr. Jarboe reviewed medical records dated from 1991 through May 16, 2000, including examination reports, x-rays, pulmonary function tests, and arterial blood gas studies, and issued a consultative report dated October 19, 2000. He opined that the Claimant does not have coal workers’ pneumoconiosis, based on the negative interpretations of his chest x-rays by numerous B readers, the lack of evidence of pneumoconiosis on CT scans of the Claimant’s chest, and pulmonary function tests which suggest airflow obstruction due

to smoking cigarettes or bronchial asthma." Dr. Jarboe diagnosed "a severe pulmonary impairment . . . due to a long history of heavy cigarette smoking" and opined that the Claimant "is totally and permanently disabled to such an extent that he would be unable to do his regular coal mining work or that requiring similar effort." In his opinion, "[the Claimant's] respiratory impairment/disability has been caused by cigarette smoking and not coal dust inhalation" (EX 7).

d. Dr. Jarboe was deposed by the Employer on January 24, 2001, at which time he recounted his earlier findings and opined that the Claimant has a disabling respiratory impairment caused by "a history of very heavy cigarette smoking, which in turn . . . has caused chronic bronchitis and severe pulmonary emphysema." Dr. Jarboe stated that the Claimant's impairment is in no way related to, caused by, or aggravated by his previous occupational exposure to coal dust (EX 10).

V. DISCUSSION AND APPLICABLE LAW

Counsel for the Claimant objected to the admission of Employer's Exhibits 4-20, arguing that the superior financial resources of the Employer undermine the truth-seeking function of the administrative process by allowing the Employer to develop a greater quantity of evidence. *See* Brief for Claimant, Jimmy Douglas Garrett, p. 7, *citing Woodward v. Director, OWCP,* 991 F.2d 314 (6th Cir. 1993). Counsel for the Claimant further argued that his objection should be sustained because the recently promulgated administrative regulations now limit the Employer to only one consulting opinion on rebuttal, and because the opinions expressed by the Employer's experts are cumulative and hostile to the Act. *See* Brief for Claimant, Jimmy Douglas Garrett, pp. 7-8. In response, the Employer argued that *Woodward* stands for the proposition that administrative fact finders cannot consider the quantity of evidence alone, without reference to the qualifications and party affiliations of the readers. *See* Employer's Closing Argument, p. 4. The Employer also noted that the supplemental consultative reports are not cumulative, and are warranted in this case, due to the Claimant's submission of additional evidence. *See* Employer's Closing Argument, p. 4.

As noted by the Employer, the Sixth Circuit's holding in *Woodward* dictates that, when embarking on an inquiry involving cumulative evidence, an administrative fact finder must make a qualitative evaluation of the evidence, instead of relying on a mere "head-counting" approach. *See Woodward,* 991 F.2d at 321.

Additionally, pursuant to § 725.2(c), all claims that were pending before the revision of the Act on January 19, 2001 shall be decided under the pre-revision version of § 725.414. This claim was pending at the time of the revision, thus the pre-revision language of the Act will be applied. Based upon the foregoing, I find that Employer's Exhibits 4-20 are admissible, and overrule the Claimant's objection.

Pneumoconiosis

Since this claim was filed after March 31, 1980, it must be adjudicated under the regulations at 20 C.F.R. §§ 718, *et seq.* Section 718.202 provides four means by which pneumoconiosis may be established. Under § 718.202(a)(1), a finding of pneumoconiosis may be made on the basis of x-ray evidence. The record contains thirty interpretations of fourteen chest x-rays. Twenty-five of the interpretations were conducted by B readers, eleven of whom are also Board-certified Radiologists. Of these twenty-five interpretations, twenty-four are negative for pneumoconiosis, and one is positive for pneumoconiosis. Interpretations by B readers are entitled to greater weight because of their expertise and proficiency in classifying x-rays. *Vance v. Eastern Assoc. Coal Corp.,* 8 B.L.R. 1-32 (1985); *Aimone v. Morris Knudson Co.,* 8 B.L.R. 1-68 (1985). Physicians who are Board-certified Radiologists as well as B readers may be accorded still greater weight. *Woodward v. Director, OWCP,* 991 F.2d 314, 316 n.4 (6th Cir. 1993), 17 B.L.R. 2-77, 2-80 (1993). The remaining five interpretations are by physicians with no special expertise in the reading of x-rays and will not be considered because of the numerous interpretations by highly qualified physicians.

The fourteen most recent interpretations of x-rays, dated August 16, 2001, February 23, 2001, February 15, 2001, May 16, 2000, and January 18, 2000, are all negative with the exception of Dr. Brandon's 1/1, p,p reading of the Claimant's August 16, 2001 x-ray. Dr. Brandon, a B reader and Board-certified Radiologist, was the only physician of record to interpret that x-ray. However, Drs. Wheeler and Scott, both B readers and Board-certified Radiologists, read the Claimant's February 15, 2001 and February 23, 2001 x-rays as negative for pneumoconiosis. Because of the numerous negative interpretations by highly qualified readers, I find that the x-ray evidence does not establish the existence of pneumoconiosis.

Under § 718.202(a)(2), a claimant may establish the existence of pneumoconiosis through biopsy or autopsy results.

This provision is inapplicable here because the record contains no such evidence.

Section 718.202(a)(3) provides that pneumoconiosis may be established if any of the several presumptions described in §§ 718.304, 718.305, or 718.306 are applicable. In the instant case, § 718.304 does not apply because there is no x-ray, biopsy, autopsy, or other evidence of large opacities or massive lesions in the lungs. Section 718.305 is not applicable to claims filed after January 1, 1982. Section 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982.

Under § 718.202(a)(4), a determination of the existence of pneumoconiosis may be made if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. Pneumoconiosis is defined in § 718.201 as a chronic dust disease of the lungs, including respiratory or pulmonary impairments, arising out of coal mine employment. It is within the Administrative Law Judge's discretion to determine whether a physician's conclusions are adequately supported by documentation. *See Lucostic v. United States Steel Corp.,* 8 B.L.R. 1-46, 1-47 (1985). An administrative law judge may properly consider opinions that are adequately supported by such data over those that are not. *See King v. Consolidation Coal Co.,* 8 B.L.R. 1-262, 1-265 (1985).

The record contains examination reports by Drs. Clapp, Houser, Selby, Simpao, Broudy, Jarboe, and Lane, and consultative reports by Drs. Fino, Castle, Dahhan, Broudy, and Jarboe.

Drs. Selby, Broudy, Jarboe, and Lane examined the Claimant and opined that he does not have pneumoconiosis. Dr. Selby opined that the Claimant does not have coal workers' pneumoconiosis or any other respiratory disease either caused by or related to coal dust exposure (EX 17). Dr. Broudy opined that the Claimant has "pulmonary emphysema with chronic obstructive airways disease due to cigarette smoking," and that "none of the [Claimant's] impairment . . . is due to pneumoconiosis . . ." (EX 3). Dr. Jarboe opined that the Claimant does not have simple coal workers' pneumoconiosis, based on the radiographic and physiologic evidence of record. Dr. Lane opined that the Claimant does not have an occupational lung disease caused by his coal mine employment (DX 17). Drs. Broudy, Selby, and Jarboe have expertise in Internal Medicine and Pulmonology, while Dr. Selby has additional expertise as a Critical Care Physician, and Dr. Lane has expertise in Internal Medicine. Drs. Broudy, Selby, Jarboe, and Lane based their opinions on their examinations of the Claimant,

as well as the Claimant's chest x-rays, pulmonary function tests, and arterial blood gas studies. These physicians specifically identified the studies upon which they relied, and their conclusions are consistent with the medical evidence of record. I find that the reports by Drs. Broudy, Selby, Jarboe, and Lane are documented, reasoned, and supported by the weight of the medical evidence of record, and I accord their examination reports substantial weight.

Drs. Clapp, Houser, and Simpao examined the Claimant and opined that he has pneumoconiosis. Dr. Clapp reported that the Claimant "has documented coworkers [sic] pneumoconiosis and COPD" (CX 7). He opined that the Claimant's COPD was contributed to by the coal mines (CX 6). Dr. Houser diagnosed pneumoconiosis based on a physical examination and history of the Claimant as well as pulmonary function testing, chest radiographs, and medical literature (CX 1). Dr. Simpao diagnosed "CWP 1/0," based on "multiple years of coal dust exposure" and "findings on the chest x-ray, arterial blood gas and pulmonary function test along with physical findings and symptomatology" (DX 11).

Although Dr. Clapp was the Claimant's treating physician, he did not identify the studies upon which he relied in diagnosing pneumoconiosis, or concluding that the Claimant's COPD was contributed to by the coal mines. An Administrative Law Judge "is not required to accord greater weight to the opinion of a physician based solely on his status as claimant's treating physician. Rather, this is one factor which may be taken into consideration . . ." *Tedesco v. Director, OWCP,* 18 B.L.R. 1-103 (1994). I find that Dr. Clapp's opinion is not well-reasoned or documented because he does not include any test data to support his conclusion. A "reasoned" opinion is one in which the Administrative Law Judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.,* 10 B.L.R. 1-19 (1987). An unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co.,* 12 B.L.R. 1-149 (1989) (*en banc)*.

To the extent that Drs. Houser and Simpao relied on the Claimant's chest x-rays to diagnose pneumoconiosis, I accord their opinions less weight, as I found the x-ray evidence negative for pneumoconiosis. Because Dr. Clapp failed to include the data to support his conclusions, I accord his opinion less weight. The evidence of record establishes that Drs. Selby, Broudy, and Jarboe are B readers and Board-certified Internists and Pulmonologists, and that Dr. Selby is also a Board-certified Critical Care Physician. Dr. Lane is a B reader

and a Board-certified Internist. The record does not contain any information to establish that Drs. Clapp and Simpao have comparable specialized skills. Dr. Houser is a Board-certified Internist, Pulmonologist, and Critical Care Physician. However, I find his opinion is outweighed by the opinions of Drs. Selby, Broudy, Jarboe, and Lane, which are better reasoned, documented, and supported by the medical evidence of record.

The three most recent reports that examine the totality of the medical evidence and address the existence of pneumoconiosis are those by Drs. Fino, Castle, and Dahhan. Drs. Fino, Castle, and Dahhan all have expertise in Internal Medicine and Pulmonology. In his November 2, 2001 consultative report, Dr. Fino opined that the Claimant "does not suffer from an occupationally acquired pulmonary condition as a result of coal mine dust exposure," based on the negative readings of the Claimant's chest x-rays, the improvement in the Claimant's pulmonary function studies with the use of bronchodilators, the reduced diffusing capacity values, and the development of new hypoxia, consistent with ongoing smoking (EX 18). In his November 7, 2001 consultative report, Dr. Castle wrote that the Claimant "does not suffer from coal workers' pneumoconiosis" (EX 19). Dr. Dahhan stated in his November 7, 2001 and October 30, 2001 consultative reports that the Claimant "has an obstructive airway disease . . . [that] was not caused by, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis" (EX 19). Drs. Fino, Castle, and Dahhan had the benefit of comparing the entirety of the medical evidence of record, and they thoroughly documented their conclusions. These physicians specifically identified the studies upon which they relied, and their conclusions are consistent with the medical evidence of record. *See Church v. Eastern Assoc. Coal Corp.,* 20 B.L.R. 1-8 (1996). As such, I find that the reports by Drs. Fino, Castle, and Dahhan are documented, reasoned, and supported by the medical evidence of record. While they are not examining physicians, their opinions are based on an extensive review of the medical evidence and are entitled to substantial weight.

Drs. Broudy and Jarboe also issued consultative reports in which they opined that the Claimant does not have pneumoconiosis. In his August 31, 2000 report, Dr. Broudy opined that the Claimant does not have pneumoconiosis because there was a progressive decline in function even after he left coal mining, and because his impairment is primarily obstructive, which is not the type of impairment associated with pneumoconiosis (EX 3). Dr. Jarboe wrote in his October 30, 2001 report that the Claimant does not have simple coal workers'

pneumoconiosis, based on the radiographic and physiological evidence of record (EX 17).

Drs. Broudy and Jarboe had the benefit of examining the Claimant, as well as reviewing the medical evidence of record. Drs. Broudy and Jarboe specifically identified the studies upon which they relied, and their conclusions are consistent with the medical evidence of record. I find that their reports are documented, reasoned, and entitled to substantial weight.

Drs. Clapp, Houser, and Simpao concluded that the Claimant has pneumoconiosis. Because I found their opinions to be outweighed by the opinions of Drs. Fino, Castle, Dahhan, Selby, Broudy, Jarboe, and Lane, I find the existence of "clinical pneumoconiosis" has not been established pursuant to 20 C.F.R. § 718.201(a)(1).

None of the physicians of record diagnosed the Claimant as suffering from a chronic lung disease or impairment and its sequelae arising out of coal mine employment. Therefore, I find that the existence of "legal pneumoconiosis" has not been established, pursuant to 20 C.F.R. § 718.201(a)(2).

VI. ENTITLEMENT

I find that the Claimant, Jimmy Douglas Garrett, has failed to establish that he has pneumoconiosis arising out of coal mine employment. Therefore, he has not established entitlement to benefits under the Act.

VII. ATTORNEY'S FEES

The award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

VIII. ORDER

It is, therefore,

ORDERED that the claim of Jimmy Douglas Garrett for benefits under the Act is hereby DENIED.

A
ROBERT L. HILLYARD
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board, P.O. Box 37601, Room S-5220, Washington, D.C., 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C., 20210.